

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SCOTT SHEWBRIDGE,
Plaintiff,

NO. CIV. S-05-0740 FCD EFB

v.

MEMORANDUM AND ORDER

EL DORADO IRRIGATION DISTRICT,
a municipal corporation; ANE
DEISTER, DAVID POWELL, THOMAS
CUMPSTON, GEORGE WHEELDON, and
GEORGE OSBORNE,

Defendants.

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This matter is before the court on a motion for summary judgment, or alternatively, partial summary judgment brought by defendants El Dorado Irrigation District ("EID"), Ane Deister ("Deister"), David Powell ("Powell"), Thomas Cumpston ("Cumpston"), George Wheeldon ("Wheeldon") and George Osborne ("Osborne") (sometimes collectively, "defendants").¹ By the

¹ Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

1 motion, defendants seek adjudication in their favor on plaintiff
2 Scott Shewbridge's ("plaintiff") complaint, alleging claims for
3 (1) violation of 42 U.S.C. § 1983 on the grounds defendants
4 retaliated against plaintiff for exercising his First Amendment
5 rights and terminated him without sufficient due process and
6 (2) conspiracy to violate plaintiff's civil rights.² Plaintiff
7 opposes the motion, arguing that triable issues of fact exist as
8 to each of his claims.

9 For the reasons set forth below, the court GRANTS in part
10 and DENIES in part defendants' motion.

11 BACKGROUND

12 In November 2001, EID hired plaintiff as a Senior Engineer
13 for the Water Division. (Pl.'s Resp. to Defs.' Stmt. of
14 Undisputed Facts ["UF"], filed Nov. 17, 2006 [Docket #36-3],
15 ¶s 1, 2.) At the time, and during all times relevant to this
16 action, plaintiff resided in El Dorado County, within EID's
17 district. (Pl.'s Stmt. of Add'l Material Facts ["AF"], filed
18 Nov. 17, 2006 [Docket #36-3], ¶ 1.) Subsequently, plaintiff
19 became the co-head of the Hydro Division. (UF ¶ 3.) Throughout
20 his employment with EID, plaintiff's primary task was to lead the
21 re-licensing of Project 184, which involved large scale water
22 diversions, conveyances, and hydroelectric facilities.
23 Plaintiff's job duties connected with this project included
24 review of documentation from past interactions, including

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26 ² In his complaint, filed April 15, 2005, plaintiff also
27 alleged a claim for wrongful termination in violation of public
28 policy under state law. Said claim, however, was dismissed on
defendants' motion under Federal Rule of Civil Procedure
12(b)(6). (Mem. & Order, filed Sept. 22, 2005 [dismissing claim
as untimely under the California Tort Claims Act].)

1 litigation, notices of violation, interactions with regulatory
2 agencies, and studies done in support of the re-licensing
3 efforts. (UF ¶ 5.) Plaintiff's duties also involved meeting
4 with the re-licensing group members, including state, federal and
5 local resource agencies, regulators, and nongovernmental
6 organizations, managing the hydrologic data and reviewing the
7 results from hydrologic modeling for EID's raw water supply. (UF
8 ¶s 6-7.) Throughout his employment, plaintiff believed he had a
9 personal and ethical obligation as a professional engineer to
10 report wrongdoing by the district and any potential danger to the
11 public. (UF ¶ 8.)

12 Defendant Powell supervised plaintiff during his employment
13 with EID. (UF ¶ 9.) Powell's duties as plaintiff's supervisor
14 included preparing written performance evaluations and discussing
15 those evaluations with plaintiff. (UF ¶ 10.) On July 21, 2002,
16 Powell prepared a performance evaluation for plaintiff,
17 indicating: "You can and do come on too strong at times however,
18 and this intimidates your employees and peers. You should tone
19 this down a bit when appropriate." (UF ¶ 11-12.) Powell
20 discussed the contents of the evaluation with plaintiff. (UF
21 ¶ 13.) On August 14, 2002, plaintiff signed the evaluation and
22 indicated he understood Powell wanted him to change his style of
23 communication. (UF ¶ 14.)

24 Thereafter, in September 2002, defendants assert plaintiff
25 again began behaving inappropriately. (UF ¶ 60.) On September
26 26, 2002, plaintiff walked out of a staff meeting in frustration
27 over comments made by defendant Deister, General Manager of EID.
28 (UF ¶s 61, 75.) On September 30, 2002, defendants claim

1 plaintiff engaged in "attack style interactions" in a meeting
2 with Board members and other staff. (UF ¶ 62.) Then, on October
3 10, 2002, defendants assert plaintiff became agitated in a
4 meeting with Deister and was accusatory and disrespectful towards
5 her. (UF ¶ 63.) Plaintiff disputes defendants'
6 characterizations of these incidents and asserts he acted
7 appropriately under the circumstances of each incident. (UF
8 ¶s 60, 62, 63.)

9 On November 15, 2002, Powell prepared another performance
10 evaluation for plaintiff, which he discussed with plaintiff. (UF
11 ¶s 20, 21.) At the time of this evaluation, plaintiff was still
12 on an initial 12-month probationary period. (UF ¶ 22.) Based on
13 the recent incidents, plaintiff's performance was deemed
14 unacceptable in this evaluation, and defendants assert
15 plaintiff's probationary period was extended.³ (UF ¶ 23.)
16 Plaintiff contends his probationary period was not extended. (UF
17 ¶ 23; AF ¶ 19.)

18 Also on November 15, 2002, Powell prepared and issued a
19 Performance Improvement Plan ("PIP") to plaintiff. (UF ¶ 24.)
20 Defendants assert the plan was intended to help plaintiff improve
21 his behavior and give him an opportunity to change his manner of
22

23 ³ Section 6 of EID's Personnel Policy Statement
24 distinguishes between regular (permanent) employees and
25 probationary employees. (UF ¶ 15.) A regular employee is an
26 employee who was hired, has received a satisfactory evaluation of
27 performance and has 12 months, or more, continuous employment
28 with the district in an established position. (UF ¶ 16.) Upon
completion of 12 months of continuous service with the district
and upon receiving a satisfactory evaluation of performance, a
probationary employee will be granted regular status. (UF ¶ 17.)
Permanent employees have the right to appeal demotions and
dismissals, but probationary employees do not. (UF ¶s 18, 19.)

1 dealing with EID personnel, including his supervisors. (UF ¶
2 25.) Plaintiff disputes that the PIP was warranted, in the first
3 instance, and asserts it was never formally initiated. (UF ¶s 25,
4 26.) According to plaintiff, on November 22, 2002, Deister told
5 him the PIP "would not be issued, that there were mistakes in it,
6 that it contained materials in it that had come from Mary Egan
7 that were wrong and it was not going to be issued." (UF ¶ 26; AF
8 ¶ 20.)

9 On February 27, 2003, plaintiff met with Deister about
10 changes that were made to the EID Organizational Chart. (UF ¶
11 27.) Defendants assert that during this meeting, plaintiff
12 closed the door to Deister's office and argued with her in a loud
13 voice, yelling and exhibiting aggressive behavior. (UF ¶ 28.)
14 Three people overheard the incident. (UF ¶ 29.) Plaintiff
15 disputes that he yelled or exhibited aggressive behavior towards
16 Deister and maintains that he acted appropriately under the
17 circumstances of two people having a disagreement. (UF ¶ 28.)

18 The following week, on March 3 or 4, 2003, plaintiff
19 received a "Notice of Two Day Suspension for Insubordination,"
20 authored and delivered by Powell. The Notice cited several
21 incidents of alleged misconduct and insubordination by plaintiff,
22 from September 2002 to February 2003, and notified plaintiff that
23 any further acts of insubordination would result in termination.
24 (UF ¶s 31, 32.)

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1 In April 2003, Powell decided to terminate plaintiff and
2 began preparing a "Notice of Intent to Terminate." (UF ¶ 40.)⁴
3 Also in April 2003, then Boardmember, Al Vargas, overheard a
4 meeting between Deister, Cumpston,⁵ Powell, Wheeldon and
5 Osborne,⁶ at which they discussed terminating plaintiff, and
6 Vargas told plaintiff defendants intended to terminate him. (UF
7 ¶ 56.)

8 In July 2003, plaintiff was given a "Skelly"⁷ hearing to
9 contest his 2-day suspension and was allowed to have counsel
10 present. (UF ¶s 33.) At the hearing, plaintiff raised questions
11 about Deister's behavior. (UF ¶ 34.) The Skelly officer upheld
12 the suspension, and plaintiff appealed the decision to the Board
13 of Directors, who also upheld the suspension. (UF ¶s 35, 36.)
14 During this appeal, plaintiff again raised questions about the
15 management style, ethics and legality of certain decisions taken
16 by Deister. (UF ¶ 38.)

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20 ⁴ Plaintiff's foundational objection to this evidence is
21 overruled. Defendant Powell filed a declaration attesting to
22 this fact, and moreover, *plaintiff* alleged this fact in his
complaint and testified that he based the allegation on a draft
version of the Notice of Intent to Terminate found in the
Department of Labor files.

23 ⁵ Defendant Cumpston is EID's General Counsel. (UF
24 ¶ 77.)

25 ⁶ Defendants Wheeldon and Osborne are members of EID's
Board of Directors. (UF ¶ 78.)

26 ⁷ Skelly v. State Personnel Bd., 15 Cal.3d 194 (1975)
27 (finding that state statutory scheme regulating civil service
28 employment confers on a permanent civil service employee a
property interest in continuation of his employment and that this
interest is protected by due process)

1 Thereafter, on August 8, 2003, plaintiff was given a Notice
2 of Intent to Terminate prepared by Powell. (UF ¶ 39.) Said
3 Notice set forth the factual basis for the termination noting
4 multiple instances whereby defendants claimed plaintiff was
5 insubordinate to his supervisor, Powell, and the General Manager,
6 Deister, and was verbally abusive to others within EID. (UF
7 ¶ 64.) Plaintiff was given an opportunity to respond via another
8 Skelly hearing, and he again had counsel present. (UF ¶ 41, 43.)
9 Steve Cascioppo, Executive Officer of El Dorado County courts,
10 served as hearing officer. (UF ¶ 42.) Mr. Cascioppo affirmed
11 the termination, and plaintiff appealed to the Board of Directors
12 on March 19, 2004. (UF ¶ 44.) The Board also affirmed
13 plaintiff's termination. (UF ¶ 45.)

14 Plaintiff claims that the negative performance reviews,
15 suspension and eventual termination were all a pretext to silence
16 him in retaliation for reporting wrongdoing by EID management.
17 (UF ¶ 46.) Plaintiff also claims he did not receive fair Skelly
18 hearings in that the judges were not impartial, and he was not
19 allowed to present his side of the story. (AF ¶ 22, 24.)

20 Both as an EID employee and as a resident of El Dorado
21 County, plaintiff asserts he had a direct interest in issues of
22 water quality, water availability, water delivery and the effect
23 of EID's management of water resources on the environment in
24 which he lived. (AF ¶ 1.) Once employed by EID, plaintiff
25 states he began to question EID management on these issues, often
26 in the face of severe rebukes. (AF ¶ 2; UF ¶ 70.) Yet,
27 plaintiff continued to advocate his position that EID was
28 mismanaging El Dorado County's water resources in ways which

1 could lead to environmental damage, water shortages, and the
2 complete unavailability of water for consumption and fire
3 suppression in El Dorado Hills. (AF ¶ 3.)

4 Specifically, either prior to his actual termination in
5 August 2003 and/or prior to his receiving notice, in
6 approximately April 2003, of defendants' intent to terminate him,
7 plaintiff:

- 8 (1) complained to Deister and Powell about Deister's
9 hostile treatment of other employees (AF ¶ 6);
- 10 (2) expressed concern about improper participation, in
11 violation of the Brown Act, by three Board members,
12 including Wheeldon and Osborne, in a participation
13 meeting regarding access to the Crawford Ditch (UF
14 ¶ 50);
- 15 (3) complained about Powell's misrepresentation at a pre-
16 Board meeting and Board meeting regarding the amount of
17 losses of water flowing through Crawford Ditch (AF
18 ¶ 4);
- 19 (4) complained to Deister about her withholding of
20 information from the Board in November 2002 through
21 January 2003 (AF ¶s 6, 18; UF ¶ 52);
- 22 (5) in May 2003, made complaints to the Department of Fish
23 and Game, the State Water Board, the Department of
24 Health Services and the California Attorney General's
25 office about EID's misrepresentations and misreporting
26 of water supply by EID and about insufficient supply to
27 meet demand in El Dorado Hills (AF ¶s 12, 13; UF
28 ¶ 47);
- (6) In May 2003, participated in a public water conference,
as a private citizen, over the objections of Cumpston,
who threatened plaintiff with loss of his job if he
participated, and Deister (AF ¶ 10, 11);
- (7) participated in a presentation regarding water supply,
demand and diversion issues to citizens of El Dorado
County through the Maidu Group of the Sierra Club (AF
¶ 14);
- (8) participated at Board meetings following his being
placed on administrative leave, to voice concerns
regarding issues of water supply and demand (AF ¶ 15);

(9) wrote letters to the editor and had discussions with reporters regarding his concerns about water supply and demand issues (AF ¶ 16); and

(10) participated in the EID Citizen's Water Advisory Group (AF ¶ 17).

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); see California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998). The evidence must be viewed in the light most favorable to the nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to meet this burden, "the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000). However, if the nonmoving party has the burden of proof at trial, the moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325.

Once the moving party has met its burden of proof, the nonmoving party must produce evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in

light of the evidentiary burden the law places on that party. See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. See Nissan Fire & Marine, 210 F.3d at 1107. Instead, through admissible evidence the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

ANALYSIS

1. § 1983 Claim⁸ - Retaliation in Violation of First Amendment Free Speech Rights

Defendants move for summary judgment as to plaintiff's retaliation claim arguing plaintiff cannot demonstrate he engaged in speech protected by the First Amendment and even if he could, plaintiff cannot demonstrate that his speech was a substantial or motivating factor in defendants' decision to terminate him. To establish a claim for retaliation in violation of free speech rights, a public employee plaintiff must demonstrate: (1) he engaged in constitutionally protected speech; (2) the employer took adverse employment action against the employee; and (3) the employee's speech was a "substantial or motivating" factor in the adverse action. Freitag v. Ayers, 468 F.3d 528, 543 (9th Cir.

⁸ Section 1983 does not create any substantive rights but rather provides a vehicle whereby a plaintiff can challenge actions by governmental officials. To establish a violation of § 1983, a plaintiff must demonstrate that (1) the action occurred under color of state law and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (internal quotations and citations omitted). Here, it is undisputed that defendants acted under "color of state law." The only issue then is whether defendants violated plaintiff's constitutional rights, namely, his First Amendment and/or due process rights.

2006). The first and third elements are at issue on this motion as the parties do not dispute that defendants' took adverse employment action against plaintiff when they terminated him.

As to the first issue, whether plaintiff engaged in protected speech, the court must engage in a three-step analysis: First, the court must determine whether plaintiff spoke as a citizen or an employee. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). Second, the court must determine whether, in light of the content, form and context of the speech, it touched on matters of public concern. Connick v. Meyers, 461 U.S. 138, 146 (1983). Third, the court must determine whether the value of the employee's speech outweighs "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Id. at 150. Ordinarily, these are questions of law for the court to decide. Id. at 148 n. 7. However, as set forth below, there are certain factual issues in this case that must be addressed by a jury first which preclude this court from making a conclusive determination herein. Accord Kodrea v. City of Kokomo, 2006 WL 1750071 (S.D. Ind. June 22, 2006).

Defendants contend that plaintiff's speech was not made in his capacity as a citizen but in the context of his employment. The Supreme Court, in Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), recently addressed the issue of whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties. The plaintiff, Ceballos, was a deputy district attorney employed as a calendar deputy with supervisory responsibilities. Id. at 1955. Pursuant to his duties, he investigated a complaint from a

1 defense attorney regarding inaccuracies in an affidavit used to
2 obtain a search warrant. Id. at 1955-56. Following his
3 investigation, Ceballos prepared a memo outlining his concerns
4 with the affidavit and recommending that the case be dismissed.
5 Id. Ceballos' memo prompted a meeting with his supervisors and
6 members of the sheriff's department that allegedly became very
7 heated. Id. at 1956. In spite of Ceballos' concerns, the
8 district attorney's office decided to proceed with the
9 prosecution. Id. Thereafter, during a hearing on a motion
10 challenging the warrant, Ceballos was called by the defense to
11 testify about his observations, but the trial court upheld the
12 warrant. Id. Ceballos claimed that he was subsequently subjected
13 to retaliation, including a transfer and denial of a promotion.
14 Id.

15 The Court found that the controlling factor in determining
16 whether Ceballos' speech was protected was that his expressions
17 were made pursuant to his official duties as a calendar deputy.
18 Id. at 1960. Part of Ceballos' responsibilities were to
19 investigate concerns and advise his supervisors regarding pending
20 cases, a fact that was not disputed by the parties. Id. Under
21 these circumstances, the Supreme Court concluded "when public
22 employees make statements pursuant to their official duties, the
23 employees are not speaking as citizens for First Amendment
24 purposes, and the Constitution does not insulate their
25 communications from employer discipline." Id.

26 In reaching this decision, the Court made several
27 observations applicable to this case. First, because the parties
28 did not dispute that Ceballos wrote the memo pursuant to his

1 employment duties, the Court observed that it did not have
2 occasion to articulate a framework for defining the scope of an
3 employee's duties in cases where there is room for serious
4 debate. Id. at 1961. It did reject, however, the suggestion
5 that an employer can restrict an employee's rights simply by
6 creating broad job descriptions. Id.⁹ In addition, the Court
7 was not persuaded that Ceballos' speech was unprotected merely
8 because he had expressed his views in the office and they
9 concerned the subject matter of his employment, explicitly noting
10 that in some cases employees may still receive First Amendment
11 protection for expressions made at work or related to the
12 employee's job. Id. at 1959.

13 Ceballos thus reveals that the "critical inquiry" in
14 addressing whether plaintiff's speech in this case was protected
15 is plaintiff's job responsibilities (i.e., was his speech made
16 "pursuant to [his] official duties"). Freitag v. Ayers, 468 F.3d
17 528, 545 (9th Cir. 2006). However, here, unlike the situation in
18 Ceballos, there is a factual dispute concerning whether
19 plaintiff's speech was made pursuant to his ordinary job duties.
20 See accord Kodrea v. City of Kokomo, 2006 WL 1750071 (S.D. Ind.
21 June 22, 2006). Defendants proffer no evidence that it was
22 plaintiff's job as a engineer for EID to report wrongdoing by the
23 district, either internally (within the district) or externally

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25 ⁹ The Court stated: "The proper inquiry is a practical
26 one. Formal job descriptions often bear little resemblance to
27 the duties an employee actually is expected to perform and the
28 listing of a given task in an employee's written job description
is neither necessary nor sufficient to demonstrate that
conducting the task is within the scope of the employee's
professional duties for First Amendment purposes." Id. at 1961-
62.

1 (to outside agencies). Instead, defendants rely on plaintiff's
2 testimony at his deposition that he believed, as a professional
3 engineer, he had an obligation to report wrongdoing by the
4 district and to respond to what he perceived as potential dangers
5 to the public; defendants maintain plaintiff's "obligation as a
6 professional engineer is inseparable from his obligation as an
7 employee of EID because he was hired by EID to work as an
8 engineer." (Mem. of P&A, filed Aug. 29, 2006, 10:17-19)
9 (emphasis in original.) Defendants' argument is not persuasive.
10 They mischaracterize plaintiff's testimony. Plaintiff did not
11 testify that such reporting was within his *job* duties for EID;
12 rather, he testified that by law, under the California Code of
13 Regulations governing engineers, he believed he had a
14 professional and ethical obligation to report wrongdoing by the
15 district and to respond to any perceived danger to the public.
16 (UF ¶ 8 [Pl.'s Dep. at 32:11-33:24].) As set forth in his
17 opposition to the motion, plaintiff clearly disputes that his
18 speech in this case fell within any specific job duties he had
19 for EID. (Id.; AF ¶ 1.)

20 What his job duties included is the "critical inquiry."
21 Freitag, 468 F.3d at 545 (emphasizing the distinction between
22 speech *attendant* to a public employee's official duties and
23 speech *about* the subject of a public employee's employment and
24 holding that only the former is not protected speech under
25 Ceballos); see also accord Wilcoxon v. Red Clay Consolidated Sch.
26 Dist. Bd. of Educ., 437 F. Supp. 2d 235 (D. Del. 2006); Kodrea v.
27 City of Kokomo, 2006 WL 1750071 (S.D. Ind. June 22, 2006).
28 Accordingly, because there are factual issues about whether

1 plaintiff's job responsibilities included the obligation to
2 report wrongdoing by the district either internally to his
3 supervisors or externally to other agencies, the court is unable
4 to conclude that plaintiff's complaints were made simply as an
5 employee in performance of his duties rather than a concerned
6 citizen. The court, therefore, must resolve any doubt in favor
7 of plaintiff for purposes of summary judgment and conclude, at
8 this stage of the proceedings, that plaintiff may have acted as a
9 concerned citizen. Defendants thus are not entitled to summary
10 judgment on this issue.

11 As to the next inquiry, whether plaintiff's speech addressed
12 a matter of public concern, the court finds that it is able to
13 make, on the record presented, this legal determination.

14 A public employee addresses a matter of public concern when
15 his speech relates to an issue of "political, social, or other
16 concern to the community." Connick, 461 U.S. at 146. "Speech
17 that concerns issues about which information is needed or
18 appropriate to enable the members of society to make informed
19 decisions about the operation of their government merits the
20 highest degree of first amendment protection." Coszalter v. City
21 of Salem, 320 F.3d 968, 973 (9th Cir. 2003). In contrast,
22 "speech that deals with individual personnel disputes and
23 grievances and that would be of no relevance to the public's
24 evaluation of the performance of governmental agencies, is
25 generally not of public concern." Id.

26 In defining the scope of First Amendment protection afforded
27 to public employees' speech, the Supreme Court has distinguished
28 between speech "as a citizen upon matters of public concern" at

1 one end and speech "as an employee upon matters only of personal
2 interest" on the other. Connick, 461 U.S. at 147. Thus, the
3 relevant inquiry under Connick is the point of the speech in
4 question--was it the employee's point to bring wrongdoing to
5 light or was the point to further some purely private interest?
6 Roth v. Veteran's Admin. of United States, 856 F.2d 1401, 1406
7 (9th Cir. 1988). It is only when it is clear that the
8 information would be of no relevance to the public's evaluation
9 of the performance of governmental agencies, that the public
10 employee's speech receives no protection. Ulrich v. City &
11 County of San Francisco, 308 F.3d 968, 978 (9th Cir. 2002).

12 The vast majority of plaintiff's speech in this case falls
13 squarely within the confines of speech addressing matters of
14 public concern. (AF ¶s 4, 10-18; UF ¶s 47, 50, 52.) With the
15 exception of his internal complaints about his supervisors'
16 treatment of employees (AF ¶ 6), his speech addressed issues
17 concerning EID's alleged misrepresentations to the public
18 concerning water supply and demand within the district and EID's
19 mismanagement of the district. As such, his speech sought to
20 bring alleged wrongdoing to light, and it addressed topics which
21 would be important to the public in evaluating the performance of
22 EID. Coszalter, 320 F.3d at 973; Roth, 856 F.2d at 1406. The
23 court, therefore, finds that said speech was of a matter of
24 public concern.

25 However, even if speech relates to a matter of public
26 concern, it is not constitutionally protected unless the
27 speaker's First Amendment interests outweigh the public
28 employer's interests "in promoting workplace efficiency and

1 avoiding workplace disruption." Ceballos v. Garcetti, 361 F.3d
2 1168, 1173 (9th Cir. 2004), *overruled on other grounds*, 126 S.Ct.
3 1951 (2006). "The employer bears the burden of proving that the
4 balance of interests weighs in its favor." Id. Defendants have
5 not met this burden. They have not presented any evidence with
6 regard to the Connick-Pickering balance test. (Mem. of P&A at
7 11:4-12 [Attorney argument that plaintiff's speech impacted EID's
8 ability to complete the re-licensing project is not evidence the
9 court can consider.].) There is nothing in the record to suggest
10 that plaintiff's speech was sufficiently disruptive so that the
11 government's interest in promoting efficiency outweighed
12 plaintiff's First Amendment rights. Moreover, the Supreme Court
13 has recognized that speech which "seek[s] to bring to light
14 actual or potential wrongdoing or breach of the public trust" is
15 entitled to heightened protection, even in the face of alleged
16 disruption to the employer. Connick, 461 U.S. at 148.
17 Accordingly, and assuming without deciding that plaintiff spoke
18 as a citizen, the court must conclude at this stage, that
19 plaintiff's speech is protected. Defendants are therefore not
20 entitled to summary judgment on this issue.

21 Finally, the court must address whether retaliation for
22 plaintiff's exercise of his First Amendment rights was the
23 substantial or motivating factor in defendants' decision to
24 terminate plaintiff. In "mixed motive" cases like this one,
25 where plaintiff alleges he was terminated for exercising his
26 First Amendment rights and defendants assert plaintiff was
27 terminated for insubordination and poor performance, the Ninth
28 Circuit has formulated a two-part burden shifting test. Gilbrook

1 v. City of Westminster, 177 F.3d 839, 854 (9th Cir. 1999).

2 First, plaintiff must show that his constitutionally protected
3 conduct was a substantial or motivating factor in defendants'
4 employment decision. If plaintiff makes this showing, then the
5 burden shifts to defendants to show, by a preponderance of the
6 evidence, that they would have reached the same decision even in
7 the absence of plaintiff's protected conduct. Id. Plaintiff can
8 sustain his burden by introducing evidence regarding the
9 proximity in time between his speech and the allegedly
10 retaliatory action. Coszalter, 320 F.3d at 977 (finding that
11 "depending on the circumstances, three to eight months is easily
12 within a time range that can support an inference of
13 retaliation").

14 Here, defendants contend plaintiff was terminated for
15 insubordination and poor performance. However, plaintiff
16 presents sufficient evidence to place that rationale in dispute.
17 Contrary to defendants' characterization of the evidence,
18 plaintiff did not *first* begin to make complaints about EID
19 management only after he found out about defendants' intent to
20 terminate him from Vargas (in April 2003). Plaintiff presents
21 evidence that from the inception of his employment with EID and
22 continuing throughout his employment up until his termination in
23 August 2003, he voiced complaints to EID management and outside
24 agencies that EID was mismanaging El Dorado County's water
25 resources in ways which could lead to environmental damage, water
26 shortages, and/or the complete unavailability of water for
27 consumption or fire suppression in El Dorado Hills. (AF ¶s 2,
28 3.) All of his complaints were made prior to his actual

1 termination in August 2003¹⁰ (AF ¶s 4, 6, 10-18; UF ¶s 47, 50,
2 52), and they coincided with defendants' poor performance
3 evaluations, suspension, and eventual termination of plaintiff.
4 As the adverse action taken against plaintiff "took place on the
5 heels of [his] protected activity," a jury may reasonably find
6 that plaintiff's speech was a motivating factor in defendant's
7 decision to terminate him. See e.g. Dey v. Colt Constr. & Dev.
8 Co., 28 F.3d 1446, 1458 (7th Cir. 1994).

9 The court likewise finds based on this same evidence that
10 plaintiff has raised a triable issue of fact that defendants'
11 stated reasons for his termination are a mere pretext. The court
12 cannot find as a matter of law, on the record presented, that
13 defendants would have reached the same decision even in the
14 absence of plaintiff's speech about the district. The underlying
15 facts regarding plaintiff's alleged insubordination and poor
16 performance are highly disputed. It is for the jury to determine
17 whether plaintiff acted appropriately in his dealings with EID
18 management; should they find that he did, defendants' stated
19 reasons for plaintiff's termination may well be unpersuasive in
20 light of plaintiff's evidence concerning the temporal nexus
21 between his complaints and defendants' adverse employment actions
22 against him.

23 Accordingly, for the above reasons, defendants' motion for
24 summary judgment as to plaintiff's retaliation claim for

25
26 ¹⁰ Contrary to defendants' argument, the court finds that
27 this is the critical date for purposes of analyzing plaintiff's
28 retaliation claim. While plaintiff may have learned of
defendants' intent to terminate him in April 2003, it is
undisputed that he was not actually terminated until August 8,
2003.

1 violation of plaintiff's First Amendment rights is denied.

2 **2. § 1983 Claim - Violation of Procedural Due Process**
3 **Rights**

4 Defendants move for summary judgment on plaintiff's
5 procedural due process claim, arguing (1) as a probationary
6 employee, plaintiff did not have a constitutionally-protected
7 property interest in his employment, and thus, he was not
8 entitled to any due process prior to his termination and (2) even
9 if plaintiff were considered a permanent employee entitled to due
10 process, he was afforded constitutionally adequate due process
11 prior to his termination. The parties agree that pursuant to
12 EID's personnel policies, only "regular" or permanent employees
13 are constitutionally entitled to procedural due process prior to
14 their termination.¹¹ Regents v. Roth, 408 U.S. 564, 577 (1972)
15 (property interests are not created by the Constitution but
16 rather are "created and their dimensions are defined by existing
17 rules or understandings that stem from an independent source").
18 The parties dispute, however, whether plaintiff was a
19 probationary or permanent employee at the time of his
20 termination. (AF ¶s 19, 20.) Nevertheless, said dispute does
21 not prevent a grant of summary judgment in favor of defendants
22 because even assuming plaintiff was a *permanent* employee, he
23 received adequate due process.

24 In this context of government employment, plaintiff was
25 entitled, at a minimum, to pre-termination notice and an
26 opportunity to respond in a hearing appropriate to the nature of
27 the case. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532,

28 ¹¹ (UF ¶s 15-22.)

1 542 (1985). The pretermination hearing, though necessary, need
2 not be elaborate. Id. at 545. Rather, "[t]he formality and
3 procedural requisites for the hearing can vary, depending upon
4 the importance of the interests involved and the nature of the
5 subsequent proceedings.'" Id. (citations omitted.) "In general,
6 'something less' than a full evidentiary hearing is sufficient
7 prior to adverse administrative action." Id. (citation omitted.)

8 Here, it is undisputed that plaintiff received both notice
9 and a hearing. He received prior notice of his termination in
10 the "Notice of Intent to Terminate," and he was given an
11 opportunity to respond in a Skelly hearing and appeal before the
12 EID Board. (UF ¶s 39, 41-45.)¹²

13 Plaintiff contends, nonetheless, that he has a viable due
14 process claim because the hearing officer was not impartial, and
15 he was not given the opportunity to present "his side of the
16 story." (AF ¶s 22, 23.) Other than his conclusory
17 allegations,¹³ however, plaintiff has no evidence to support his
18 claims. First, he has no factual basis for his assertion that

19 ¹² Plaintiff also, at times in his briefing, makes
20 reference to an alleged lack of due process relating to his 2-day
21 suspension. However, plaintiff has not cited any law
22 demonstrating he is constitutionally entitled to any process
23 relating to such disciplinary action. As such, the court
24 considers plaintiff's due process claim only with respect to his
25 termination.

26 ¹³ In his deposition, plaintiff testified he believed the
27 due process procedures were inadequate because there was "no
28 segregation of management from judicial in the proceedings." He
stated he believed the hearing officer was "behold(ed) to the
political powers in El Dorado County for his job" and that he
"underst[ood] from others that [Cascioppo] and [defendant]
Cumpston knew of each other when Mr. Cumpston worked at the - for
the El Dorado Water Agency and that they had a friendly
relationship." This latter statement is clearly inadmissible
hearsay.

1 hearing officer, Cascioppo, was biased against him. Indeed, the
2 undisputed evidence is to the contrary. Cascioppo was not
3 employed by EID; he was the Executive Officer of El Dorado County
4 courts. (UF ¶ 42.) Moreover, Cascioppo's decision was reviewed
5 by the EID Board, and plaintiff likewise produces no evidence
6 that the EID Board members were biased against him in reviewing
7 his appeal. (AF ¶ 22.) Plaintiff cannot simply rest on his
8 allegations without any significant probative evidence tending to
9 support his complaint. Nissan Fire & Marine, 210 F.3d at 1107.
10 As plaintiff has no such evidence here, his due process claim on
11 this basis must be dismissed.

12 Second, while plaintiff concedes he was given a hearing and
13 appeal in order to respond to the notice of termination, he
14 complains that he was not afforded adequate due process because
15 at those proceedings he was not allowed to "present his side of
16 the story." Notably, plaintiff had counsel at both proceedings,
17 and it is undisputed that he was permitted to speak and state his
18 objections to the termination. (UF ¶s 41-45.) This is all that
19 due process requires. That *plaintiff* may have preferred to
20 discuss his allegations of wrongdoing by EID instead of the
21 allegations against himself does not raise a due process
22 violation. Plaintiff was constitutionally entitled to an
23 *opportunity* to respond to the termination notice, and he received
24 it. Therefore, summary judgment in favor of defendants is also
25 granted as to this basis for plaintiff's due process claim.

26 3. Conspiracy to Violate § 1983

27 Defendants move to dismiss plaintiff's conspiracy claim,
28 arguing that said claim is not cognizable under § 1983. Citing

1 Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962), defendants argue
2 the Ninth Circuit has only recognized such a claim in *dicta*.
3 Defendants are incorrect. Subsequent to Cohen, the Ninth Circuit
4 has expressly recognized a conspiracy claim under § 1983.
5 Gilbrook v. City of Westminster, 177 F.3d 839, 848-52 (9th Cir.
6 1999) (upholding jury verdict finding city mayor, city council
7 members, the assistant city manager, the fire chief and other
8 city officials liable under § 1983 for conspiracy to violate city
9 firefighters' First Amendment rights); see also Mendocino
10 Environmental Center v. Mendocino County, 192 F.3d 1283, 1301
11 (9th Cir. 1999).

12 To establish the defendants' liability for a conspiracy, a
13 plaintiff must demonstrate the existence of "an agreement or
14 meeting of the minds to violate constitutional rights."
15 Mendocino Environmental Center, 192 F.3d at 1301 (internal
16 quotations omitted). Here, for the reasons set forth above,
17 plaintiff has raised triable issues of fact with respect to his
18 First Amendment retaliation claim sufficient to withstand summary
19 judgment on that claim and, correspondingly, on this claim. As
20 to defendants' alleged "agreement" to violate plaintiff's First
21 Amendment rights, plaintiff proffers evidence that the individual
22 defendants met as part of an ad hoc committee to plan his
23 termination. (AF ¶s 8, 9.) Such evidence is sufficient to raise
24 a triable issue as to whether defendants engaged in "some
25 concerted action, intend[ing] to accomplish [the] unlawful
26 objective" of terminating plaintiff for exercising his First
27 Amendment rights. Mendocino Environmental Center, 192 F.3d at
28 1301. Indeed, whether defendants were involved in an unlawful

1 conspiracy is generally a factual issue which should be resolved
2 by the jury, "so long as there is a possibility that the jury can
3 infer from the circumstances (that the alleged conspirators) had
4 a meeting of the minds and thus reached understanding to achieve
5 the conspiracy's objectives." Id. at 1301-02 (internal
6 quotations omitted). Therefore, defendants' motion for summary
7 judgment as to this claim is denied.

8 **4. Qualified Immunity**

9 Plaintiff sues the individual defendants in this action in
10 both their official and individual capacities. (Compl., ¶s 3-7.)
11 With respect to plaintiff's claims against them in their
12 individual capacities, the individual defendants move for summary
13 judgment on the basis of qualified immunity.¹⁴ As the court
14 dismisses plaintiff's due process claim against all defendants,
15 it discusses herein only whether the individual defendants are
16 entitled to qualified immunity as to plaintiff's First Amendment
17 retaliation claim.

18 Public officials are entitled to qualified immunity for acts
19 that do not violate "clearly established . . . constitutional
20 rights of which a reasonable person would have known." Harlow v.
21 Fitzgerald, 457 U.S. 800, 818 (1982). Thus, when considering a
22

23 ¹⁴ It is not clear from defendants' motion whether they
24 also seek summary judgment on the ground of qualified immunity
25 with respect to plaintiff's claims against them in their *official*
26 capacities. Such relief is clearly not available as qualified
27 immunity applies only to suits against government actors in their
28 individual capacities. Hafer v. Melo, 502 U.S. 21, 25 (1991).
Accordingly, the court construes defendants' motion as seeking
relief on the ground of qualified immunity only as to plaintiff's
claims against the individual defendants in their individual
capacities.

1 defendant's motion for summary judgment on the ground of
2 qualified immunity, "[t]he threshold question . . . is whether,
3 taken in the light most favorable to the party asserting injury,
4 the facts alleged show that the officer's conduct violated a
5 constitutional right." Bingham v. City of Manhattan Beach, 329
6 F.3d 723, 729 (9th Cir. 2003), superceded by 341 F.3d 939 (citing
7 Saucier v. Katz, 533 U.S. 194, 201 (2001)). If a violation can
8 be made out, the next step is to determine whether the right
9 violated or the law governing the official's conduct was clearly
10 established such that "it would be clear to a reasonable officer
11 that his conduct was unlawful in the situation he confronted."
12 Id. (quoting Saucier, 533 U.S. at 202); Act Up!/Portland v.
13 Bagley, 988 F.2d 868, 871 (9th Cir. 1993).

14 Where a defendant's conduct violates constitutional rights
15 and the law is clearly established, the defendant may not claim
16 qualified immunity.

17 Here, the threshold inquiry is satisfied because the court
18 has determined above that a reasonable jury could find that the
19 individual defendants violated plaintiff's First Amendment
20 rights. The next question is whether, at the time of plaintiff's
21 termination, the law regarding First Amendment retaliation was
22 clearly established such that a reasonable officer would have
23 been on notice that such conduct was unlawful. Saucier, 533 U.S.
24 at 205.

25
26 At the time, the law was clearly established that county
27 officers cannot retaliate against employees for the exercise of
28 First Amendment rights. Hyland v. Wonder, 117 F.3d 405, 410 (9th

1 Cir. 1997).

2 We have held that as early as 1983 '[i]t could hardly
3 be disputed that . . . an individual had a clearly
4 established right to be free of intentional retaliation
5 by government officials based upon that individual's
6 constitutionally protected expression.' [citation
7 omitted] When the individual is a government employee,
8 he or she has a right to speak on issues of public
9 importance without being fired from public employment.
[citation omitted] In Hyland I, we noted that the
well-established 'right of public employees to speak on
matters of public concern . . . is an outgrowth of the
constitutional tenet that public officials may not deny
or deprive a person of a governmental benefit or
privilege on a basis that infringes her or his freedom
of speech.' [citation omitted]

10 Id. Thus, given the established state of the law at the time in
11 question, the individual defendants had "fair warning" that
12 termination of plaintiff for exercising his First Amendment
13 rights was unconstitutional. Hope v. Pelzer, 535 U.S. 730, 741
14 (2002) (noting that the salient question is whether the law at
15 the time of the disputed conduct gave the defendant "fair warning
16 that their alleged treatment of [the plaintiff] was
17 unconstitutional").

18 Accordingly, because there are triable issues of fact as to
19 whether the individual defendants terminated plaintiff for
20 exercising his First Amendment rights, and because the individual
21 defendants had fair notice that their alleged conduct was
22 unconstitutional, the court cannot find, on summary judgment,
23 that they are entitled to qualified immunity.

24 **5. Punitive Damages against EID**

25 Defendants move to dismiss plaintiff's claim for punitive
26 damages against EID on the ground that as a municipal corporation
27 EID is absolutely immune from such damages claims. City of
28

1 Newport v. Fact Concerts, 453 U.S. 247, 267 (1981) (finding
2 municipalities immune from punitive damages claims brought under
3 § 1983 as it would be wrong that "retribution should be visited
4 upon the shoulders of blameless and unknowing taxpayers").
5 Plaintiff responds, not challenging the controlling law, but
6 arguing that defendants have failed to proffer evidence that EID
7 is a municipal corporation. However, it is *plaintiff's* burden to
8 produce evidence that EID is not such a corporation, and
9 *plaintiff* has not done so. Moreover, plaintiff alleges in his
10 complaint that EID is a municipal corporation. (Compl., filed -
11 [caption names the El Dorado Irrigation District, "a municipal
12 corporation"].) Under federal law, a party is conclusively bound
13 by the factual allegations in his pleading. American Title Ins.
14 Co. v. Lancelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). As
15 such, plaintiff is bound by his allegations regarding EID's
16 corporate status, and accordingly, either under City of Newport
17 or based on plaintiff's lack of an evidentiary showing, the court
18 grants summary judgment in favor of defendants on this issue.

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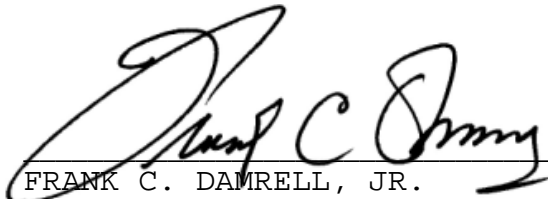
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1 **CONCLUSION**

2 For the foregoing reasons, defendants' motion for summary
3 judgment is GRANTED in part and DENIED in part. The motion is
4 granted with respect to plaintiff's claim for punitive damages
5 against defendant EID. The motion is also granted with respect
6 to plaintiff's § 1983 claim against all defendants for violation
7 of plaintiff's due process rights. The motion, however, is
8 denied with respect to plaintiff's § 1983 claim against all
9 defendants for violation of plaintiff's First Amendment rights
10 and conspiracy to violate said rights.

11 IT IS SO ORDERED.

12 DATED: December 19, 2006

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17 FRANK C. DAMRELL, JR.
18 UNITED STATES DISTRICT JUDGE
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